No. 03-8661

In The

Supreme Court of the United States

MELVIN T. SMITH,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ Of Certiorari To The Appeals Court Of The Commonwealth Of Massachusetts

REPLY BRIEF FOR PETITIONER

DAVID NATHANSON
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street
Boston, MA 02108
617-482-6212

Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

Our Constitution does not contemplate second-class acquittals. One is either acquitted of an offense or one is not. Yet, the state and amici curiae in support of the respondent state would have this Court make exceptions to this common sense rule. For example, they would remove certain acquittals from the reach of the Fifth Amendment's Double Jeopardy Clause by distinguishing between acquittals by a judge and acquittals by a jury[1] and by distinguishing between "legal" acquittals and "factual" acquittals.[2] This court has repeatedly rejected such nice (and artificial) distinctions.[3] As such, the state asks this court to depart from the settled law of the Double Jeopardy Clause.

The state and amici curiae supporting the state would have the Court parse the Double Jeopardy Clause and its jurisprudence as finely as possible in order to enhance the state's ability to convict. But that is not the proper way to read the Double Jeopardy Clause. As this Court explained one hundred and thirty-one years ago in *Ex Parte Lange*:

> There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should

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[1] Resp. Br. at 13-14; United States Br. at 10-17.

[2] Resp. Br. at 17-20.

[3] *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977)); *Sanabria v. United States*, 437 U.S. 54, 77 (1978); *Smalis v. Pennsylvania*, 476 U.S. 140, 144 (1986).

> be given to the words of the fundamental law in which they are embodied.[4]

The reason for this construction lies in the recognition that

> [t]he common law maxim [*nemo debet bis vexari pro una et eadem causa*], and the Constitution are founded in the humanity of the law, and in a jealous watchfulness over the rights of the citizen, when brought in unequal contest with the State.[5]

Smith, brought into an unequal contest with the state, was acquitted by a competent tribunal. That basic fact cannot be disguised by the state's overly narrow interpretations of precedent. "Not guilty" means not guilty.

I. The trial judge's entry of a "Required Finding of Not Guilty" constituted an acquittal of Smith

A. A "Required Finding of Not Guilty" constitutes a resolution of some or all of the elements of the offense.

The state argues that the judge's order could not have been a "resolution, correct or not, of some or all of the factual elements of the offense"[6] because the trial judge "does not have the authority to resolve the facts."[7] But this Court stated in *United States v. Scott, United States v. Martin Linen*, and *Smalis v. Pennsylvania* that

[4] *Ex Parte Lange*, 85 U.S. 163, 178 (1873).

[5] *United States v. Sanges*, 144 U.S. 310, 315 (1892) (*quoting State v. Jones*, 7 Ga. 422, 422-425 (Ga. 1849)).

[6] *Martin Linen*, 430 U.S. at 571.

[7] Resp. Brief at 13; *see id.* at 25.

the granting of a motion for acquittal at the close of the prosecution's case is indeed a resolution of the factual elements of the offense, and constitutes an acquittal.[8] Thus, the state's argument to the contrary ignores controlling precedent.

The argument also relies on a distortion of the standard that the trial judge applied when she decided Smith's motion for acquittal. The state argues that a trial judge deciding a motion for acquittal has no authority to "resolve" conflicting facts, and therefore no judge can ever enter a binding judgment on a motion for acquittal.[9] But the limitation on resolving conflicting evidence does not bar the judge from making the resolution of the factual elements that is necessary when ruling on a motion for acquittal. Indeed, the state's argument was foreclosed long ago in *Martin Linen*, where this court held that

> [s]uch a limitation on the role of a trial judge, [i.e., the inability to weigh credibility on a motion for acquittal] however, has never inhibited his ruling in favor of a criminal defendant. *Fong Foo v. United States*, 369 U.S. 141 (1962), establishing the binding nature of a directed verdict, is dispositive on that point.[10]

The resolution that this Court speaks of in the relevant cases is not a resolution of the conflicting facts, but a resolution of the "factual *elements*" of the offense.[11] The

[8] *Sanabria*, 437 U.S. at 71-72; *United States v. Scott*, 437 U.S. 82, 91, 97 (1978); *Smalis*, 476 U.S. at 144.

[9] Resp. Br. at 13.

[10] *Martin Linen*, 430 U.S. at 573.

[11] *Martin Linen*, 430 U.S. at 571 (emphasis added).

trial judge did not resolve *facts* in Smith's case. She resolved the question of whether the evidence could meet the elements of the offense. She evaluated the states' case in the light most favorable to the prosecution[12] and – correctly or not – ruled that the evidence introduced by the state failed to establish an essential element of the offense.[13] That is an acquittal.

Finally, even if the court did not have the power to enter an acquittal, the acquittal is still final and preclusive because the Court had jurisdiction over the defendant and the offense.[14]

B. An acquittal entered by a trial judge carries the same force as an acquittal by a jury.

The state would have this Court distinguish between acquittals entered by a judge and those returned by a jury.[15] Indeed, the state argues that the long-established prohibition against "'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged,' can *only* be understood only in the context of a bench trial."[16] This Court's consistent precedent foreclosed this argument decades ago.

An acquittal by a judge carries the exact same consequence as an acquittal returned by a jury: jeopardy

[12] J.A. 21.

[13] J.A. 21, 22.

[14] *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *Ex Parte Lange*, 85 U.S. at 174.

[15] Resp. Br. at 18-19.

[16] Resp. Br. at 19 (*quoting Jenkins*, 420 U.S. at 370) (emphasis added).

terminates.[17] In *Martin Linen* (a case involving a jury trial), this Court declared that there is "no 'legal distinction' between judge and jury with respect to the invocation of the protections of the Double Jeopardy Clause."[18] Thus, the state's argument is meritless.

The state attempts to distinguish *Smalis* by asserting that, because in that jury-waived case the trial judge also assumed the role of fact-finder, that judgment of acquittal was somehow different from the trial judge's ruling in Smith's case.[19] But the judge in *Smalis* did not resolve conflicting evidence in granting Smalis' demurrer. Rather, the trial judge in *Smalis* allowed the defendant's demurrer by applying the familiar directed verdict standard, which required drawing "all reasonable inferences which the Commonwealth's evidence tended to prove."[20]

Hence, both the judge in *Smalis* and the judge in Smith's case applied the directed verdict standard and found that the evidence viewed in the light most favorable to the prosecution was insufficient for any reasonable fact-finder to find guilt. The judge's ruling terminated jeopardy in *Smalis*. The trial judge's ruling in this case also terminated jeopardy, and for the same reasons.

[17] *Fong Foo*, 369 U.S. at 143; *Martin Linen*, 430 U.S. at 573; *Sanabria*, 437 U.S. at 64 and n.18; *Hudson v. Louisiana*, 450 U.S. 40, 44-45, n.5 (1981); *Arizona v. Rumsey*, 467 U.S. 203, 210-212 (1984); *Smalis*, 476 U.S. at 145.

[18] *Martin Linen*, 430 U.S. at 573.

[19] Resp. Br. at 19.

[20] *Smalis*, 476 U.S. at 142 and n.2.

C. An acquittal based on the prosecution's failure to present sufficient evidence as a matter of law carries the same weight as a jury's verdict of not guilty.

The state argues that a motion for acquittal, granted because the prosecution's proof is insufficient as a matter of law, is merely a "legal ruling" and not an acquittal.[21] This Court's decision in *Sanabria* flatly rejected that argument:

> Unlike questions of whether an indictment states an offense, a statute is unconstitutional, or conduct set forth in an indictment violates the statute, what proof may be presented in support of a valid indictment and the sufficiency of that proof are not 'legal defenses'.[22]

As explained in *Smalis*, a defendant who makes a motion for acquittal seeks

> a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt. Our past decisions, which we are not inclined to reconsider at this time, hold that such a ruling is an acquittal under the Double Jeopardy Clause. See, *e.g. United States* v. *Martin Linen Supply Co.*, [430 U.S. 564 (1977)]; *Sanabria* v. *United States*, [437 U.S. 54 (1978)]. *United States* v. *Scott* does not overturn these precedents; indeed, it plainly indicates that the category of acquittals

[21] Resp. Br. at 16-18, 21.

[22] *Sanabria*, 437 U.S. at 77.

> includes "[judgments] . . . by the court that the evidence is insufficient to convict."[23]

Thus, the state's argument on this point is also meritless.

II. The state's proposal that jeopardy should terminate only upon discharge of the jury is wrong as a matter of law and is a slippery slope into trial-level chaos and appellate confusion.

The state and amici curiae Idaho, et al., argue that, even upon a finding of insufficient evidence by the trial judge, jeopardy does not terminate until the factfinder (here, the jury) is discharged.[24] Amicus United States does not state when jeopardy terminates under its view. But it implicitly adopts the state's position, given the United States' remarkable argument that "*all* mid-trial rulings granting an acquittal – no matter how definitively expressed" are incapable of terminating jeopardy.[25] This proposition is incorrect as a matter of law because this Court found in *Smalis* that the Double Jeopardy Clause is violated when further proceedings follow an acquittal even when the trial can resume before the exact same factfinder.[26]

[23] *Smalis*, 476 U.S. at 144 (footnotes omitted) (*quoting Scott*, 437 U.S. at 91).

[24] Resp. Br. at 12-15; Idaho Br. at 5-8.

[25] United States Br. at 22 (emphasis in original).

[26] *Smalis*, 476 U.S. at 145; *Rumsey*, 467 U.S. at 211-12; *see Jenkins*, 420 U.S. at 369 n.13; *see also United States v. Dyer*, 546 F.2d 1313, 1316 (7th Cir. 1976); *United States v. Certified Grocers Co-op*, 546 F.2d 1308, 1312-1313 (7th Cir. 1976).

But also, the rule advocated by the state and amici curiae supporting the state would introduce chaos into intense, but otherwise orderly, trials. For example, under this theory, the judge would be permitted to reconsider an acquittal, re-instruct the jury, and submit the already-acquitted offense to the jury at any of the follow points in trial:

- at the close of the defense case, after it has presented evidence helpful to the defense on the remaining charges but damaging on the already-acquitted offense;
- during jury deliberations, immediately after the jury announces that it has reached a verdict on the remaining charges, or after it has returned with questions suggesting to the prosecutor that it is heading towards acquittal on the remaining charges;
- after the jury returns a not guilty verdict on one count but remains empanelled to consider additional charges; and
- after the jury announces a complete not guilty verdict, if the judge refuses to discharge them.[27]

Moreover, if it is only the discharge of the jury that makes an acquittal final, prosecutors could routinely petition appellate courts for writs of mandamus to prevent the formal discharge of the jury after granted motions for acquittal. (Indeed, in *United States v. Ellison*, the Tenth

[27] *See Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 320-21 (1984) (Brennan, J., concurring).

Circuit rejected en banc just such a mandamus petition[28] and this Court rejected the government's motion for an emergency stay.[29]) And it appears that the government pursued a similar unsuccessful strategy of asking for mandamus in *Fong Foo v. United States*.[30] Citing *Fong Foo*, this Court later noted its condemnation of the use of mandamus as a substitute for an appeal of an acquittal in *Will v. United States*.[31] But the state's theory, if accepted, presents an exception that will swallow the rule against double jeopardy.

In place of Double Jeopardy Clause analysis, the state and the United States argue that reconsideration of an acquittal should only be evaluated instead as a due process problem of detrimental reliance.[32] But the Double Jeopardy Clause is not so frail an instrument that its reach can be avoided by simply labeling its violation a "due process" problem.[33] This approach, besides being faithless to the Constitution, would be unwise as a matter of judicial policy. It asks the Court to allow trial judges free reign to allow prosecutorial requests to reconsider acquittals. And it asks this Court to create a new constitutional claim of error (detrimental reliance on an acquittal). As in the examples given above, that combination ensures that this new class of error will proliferate and engender otherwise unnecessary litigation.

[28] *United States v. Ellison*, 722 F.2d 595 (10th Cir. 1982).

[29] *United States v. Sutton*, 732 F.2d 1483, 1487 (10th Cir. 1984).

[30] *In re United States*, 286 F.2d 556, 563 (1st Cir. 1961), *overruled sub nom. Fong Foo v. United States*, 369 U.S. 141 (1962).

[31] *Will v. United States*, 389 U.S. 90, 96 (1967).

[32] Resp. Br. at 24-25; United States Br. at 27.

[33] *See Sanabria*, 437 U.S. at 72.

III. A judge's supposed "inherent authority" to reconsider interlocutory rulings does not trump the Constitution's limitation against placing defendants twice in jeopardy for the same offense.

The state and amici curiae supporting the state argue that the trial judge had the inherent authority to reconsider her acquittal of Smith because judges, as a general matter, have the power to reconsider rulings.[31] But this general rule is irrelevant to double jeopardy analysis because "[a]n acquittal is accorded special weight"[35] and greater finality than ordinary judgments.

The Massachusetts Appeals Court cited *Commonwealth v. Haskell*,[36] as precedent for a judge's inherent authority to reconsider an acquittal.[37] The state additionally cites *Bradford v. Knights*[38] and *Commonwealth v. Downs*,[39] as authority. But *Haskell* and *Downs* deal with pre-trial motions to suppress,[40] and *Bradford* deals with a magistrate's pre-trial decision whether to issue a complaint.[41] *Smith* is the *only* Massachusetts case that has

[31] Resp. Br. at 15-16; United States Br. at 12-14.

[35] *United States v. DiFrancesco*, 449 U.S. 117, 128-130 (1980); *Tibbs v. Florida*, 457 U.S. 31, 41 and n.15 (1982).

[36] *Commonwealth v. Haskell*, 438 Mass. 790, 792, 784 N.E.2d 625 (2003).

[37] J.A. at 125; Resp. Br. at 15, 27.

[38] *Bradford v. Knights*, 427 Mass. 748, 752, 695 N.E.2d 1068, 1071 (1998).

[39] *Commonwealth v. Downs*, 31 Mass. App. Ct. 467, 469, 579 N.E.2d 679, 681 (1991).

[40] *Haskell*, 438 Mass. at 792, 784 N.E.2d at 627-28; *Downs*, 31 Mass. App. Ct. at 469, 579 N.E.2d at 681.

[41] *Bradford*, 427 Mass. at 752.

ever held that a judge has the authority to reconsider a verdict of not guilty.[42]

Amicus United States argues that the Double Jeopardy Clause must be interpreted in light of the "background rule" permitting reconsideration of all "mid-trial" rulings as a function of a judge's inherent authority.[43] The argument assumes the point at issue: whether a granted motion for acquittal represents the end of trial. Simply labeling the ruling to be "mid-trial" does not resolve anything.

The argument that the Double Jeopardy Clause must be interpreted with regard to this "background rule" is also backwards. Any rule generally permitting reconsideration must be read in light of the supremacy of the Constitution, and not the other way around. General uncodified policies of courtroom procedure cannot trump the constitutional right not to be placed twice in jeopardy for the same offense any more than a state statue or court rule can trump that right.[44] Rather, the specific injunctions of the Fifth Amendment, statutes, and even court rules – such as the requirement of an immediate ruling under Mass. R. Crim. P. 25(a) – all trump inherent authority.[45] Indeed, the invocation of inherent authority is disfavored

[42] J.A. 125-26.

[43] United States Br. at 22.

[44] *Benton v. Maryland*, 395 U.S. 784 (1969); *Hudson*, 450 U.S. at 44-45; *Smalis*, 476 U.S. at 144 n.5; *Crist v. Bretz*, 437 U.S. 28, 37 (1978).

[45] *Carlisle v. United States*, 517 U.S. 416, 431 (1996); *Mallard v. United States Dist. Court for Southern Dist.*, 490 U.S. 296, 308 n.8 (1989).

as a general matter, regardless of whether constitutional rights are involved.[46]

As such, saying that a judge has inherent authority to reconsider says nothing about what our Constitution requires. Under pre-1789 English common law, judges had the authority to discharge juries headed for acquittal, as in the infamous *Ireland's Case*.[47] But the Fifth Amendment represented a codification of the colonists' revolt against this oppressive practice.[48] Under our Constitution, a judge has no "inherent authority" to reconsider an acquittal.

IV. The double jeopardy protection claimed by Smith is his right to respite from further prosecution after acquittal, not his "valued right to a particular tribunal."

The state and amici curiae supporting the state repeatedly attempt to characterize the right at issue in this case as Smith's "valued right to a particular tribunal."[49] Smith does not rely, and never has relied, on this aspect of the Double Jeopardy Clause. The "particular tribunal" analysis applies to cases dealing with mistrials declared without manifest necessity,[50] not acquittals on the

[46] *Degen v. United States*, 517 U.S. 820, 823 (1996).

[47] 2 M. Hale, Pleas of the Crown 294-295 (1847); *Ireland's Case*, 7 How. St. Tr. 79 (1678); *Whitebread's Case*, 7 How. St. Tr. 311 (1679)

[48] Friedland, Double Jeopardy 12, 13 (1969); *Brock v. North Carolina*, 344 U.S. 424, 442 (1953) (Douglas, J. dissenting).

[49] Resp. Br. at 12, 20, 23, 28; Idaho Br. at 8; United States Br. at 21.

[50] *Arizona v. Washington*, 434 U.S. 497, 505 (1978).

merits.[51] Instead, Smith relies on the absolute prohibition against further proceedings after an acquittal.[52]

Indeed, if the issue was simply a defendant's right to a particular tribunal, the government could justify the direct appeal of any acquittal if it could simply demonstrate manifest necessity for its appeal. But that is not the law.[53] The right to a particular tribunal, although valued, is simply not at issue in this case.

V. A ruling in favor of Smith's double jeopardy claim works no change upon state procedures allowing defendants to move for an acquittal at the close of the prosecution's evidence.

The state and amici curiae supporting the state argue that accepting Smith's position would erode defendants' protection from deficient prosecutions. They claim it would (1) push trial judges toward denying or reserving motions for acquittal and (2) push states toward forbidding trial judges from granting motions for acquittal.[54] Smith regards the state's purported concerns for the protection of defendants with skepticism, given that the state seeks to withdraw binding force from all motions for acquittal.[55] But assuming the sincerity of the argument, the argument fails on the merits.

[51] *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982) (*citing Sc[illegible]*, 437 U.S. at 93).

[52] *United States v. Ball*, 163 U.S. 662, 671 (1896).

[53] *Kepner v. United States*, 195 U.S. 100, 126-130 (1904).

[54] Resp. Br. at 23; United States Br. at 28; Idaho Br. at 9-11.

[55] Resp. Br. at 12-15; Idaho Br. at 5-8; United States Br. at 22.

As to pushing trial judges toward denying motions for acquittal, erring on the side of denial is both proper and common practice. The standard for a motion for acquittal is whether *any* rational trier of fact could find guilt beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution.[56] The standard is designed to be easily satisfied because judges ought to be careful about pretermitting a prosecution, and they are. Judges in nearly every state see these motions in virtually every case tried before them. But they normally deny them because the standard for sufficiency is easily satisfied by well-prepared prosecutors.

Second, amici curiae United States and Idaho, et al., argue that judges hastily grant motions for acquittal because they do not want to delay trials and that judges should be allowed to reconsider those supposedly hasty decisions later in the trial.[57] The decision to grant a motion for acquittal does not happen so precipitously as the state would have it. Motions for acquittal are made at the close of the prosecution's case, a natural break in the trial. The jurors are often excused during discussion of these and other motions. There is no reason to think that, as a general matter, judges do anything other than handle these motions in a considered and careful way.

On the other hand, adopting the state's rule injects chaos into what is an otherwise well-understood and orderly procedure. Parties will have no idea what has been determined by the Court or when those determinations might change. Defendants will not know what charges to

[56] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

[57] United States Br. at 23; Idaho Br. at 10.

defend against. Prosecutors will not be able to determine the bounds of relevant cross-examination. And judges would also be unfairly burdened. Particularly during the defense case, judges must listen to the evidence to determine whether the defendant is entitled to any number of jury instructions. With charges dropping out and then popping back in to the case, judges could easily (and understandably) miss the evidentiary foundation for instructions on charges later resurrected by reconsideration. That is no way to run a trial.

Amici curiae Idaho, et al., argue that states like Massachusetts that require an immediate ruling on sufficiency of the evidence[58] would be particularly burdened by adoption of Smith's position.[59] There would be no such burden. Of the eleven states identified by Idaho, four already prohibit reconsideration of an acquittal[60] and the caselaw of five others strongly suggests that they would prohibit reconsideration of an acquittal.[61] And because Fed. R. Crim. P. 29 explicitly permits reservation, there would be no particularly remarkable impact upon federal

[58] Mass. R. Crim. P. 25(a).

[59] Idaho Br. at 9-10.

[60] *State v. Millanes*, 885 P.2d 106, 110 (Ariz. Ct. App. 1994); *State v. Lee*, 982 P.2d 340, 345 (Haw. 1999); *People v. Henry*, 789 N.E.2d 274, 286 (Ill. 2003); *State v. Blacknall*, 672 A.2d 1170, 1173-76 (N.J. Super. App. Div. 1995), *affirmed*, 143 N.J. 419 (N.J. 1996).

[61] *See Ex parte Bishop*, No. CR-02-2295 (Ala. Crim. App. 2003) (released for publication August 17, 2004); *see People v. Waggoner*, 196 Colo. 578, 581 (Colo. 1979); *see State v. Gurske*, 395 N.W.2d 353, 356 (Minn. 1986); *see State ex rel. Yates v. Court of Appeals*, 512 N.E.2d 343 (Ohio 1987); *see State v. Jackson*, 857 P.2d 267, 269 (Utah Ct. App. 1993).

practice (as well as the practice of those states that permit reconsideration).

VI. Considerations of prejudice and reliance are simply not cognizable in claims of Double Jeopardy.

The state implicitly acknowledges that prejudice is irrelevant to violations of the Double Jeopardy Clause.[62] Nevertheless, the state, along with amici curiae United States and Criminal Justice Legal Foundation (CJLF), persist in defending the Massachusetts Appeals Courts' reliance on its conclusion that reconsideration of Smith's acquittal did not prejudice him. They assert that prejudice is lacking because reconsideration of the acquittal supposedly did not affect Smith's trial strategy,[63] i.e., it did not affect Smith's decisions as to which witnesses to call and what evidence to present. But in *United States v. Jorn*, this Court refused to allow a mistrial-related Double Jeopardy claim to turn

> on an appellate court's post hoc assessment as to which party would in fact have been aided in the hypothetical event that the witnesses had been called to the stand . . . That conception of benefit, however, involves nothing more than an exercise in pure speculation.[64]

So the question is not whether the reconsideration of his acquittal prejudiced Smith. The Constitution answers that

[62] Resp. Br. at 24-25.

[63] Resp. Br. at 29; United States Br. at 27; CJLF Br. at 25; J.A. 126-27.

[64] *United States v. Jorn*, 400 U.S. 470, 483 (1971).

question definitively. Instead, if there is to be an inquiry as to prejudice, the question is actually whether the jury's consideration of the jeopardy-barred firearm charge prejudiced Smith as to the non-jeopardy barred offenses.[65] That issue should be remanded to the state court for further consideration.[66]

CONCLUSION

This Court should reverse the judgment of the Massachusetts Appeals Court and remand the case to that court with directions to enter a judgment of not guilty of the firearm charge. The Court should also remand to the Massachusetts Appeals Court to determine whether consideration of the jeopardy-barred offense prejudiced Smith with regard to the charges of assault and battery with a dangerous weapon and armed assault with intent to murder.

Respectfully submitted,

DAVID NATHANSON
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street
Boston, MA 02108
617-482-6212

Counsel for Petitioner

[65] *Benton*, 395 U.S. at 797; *Price v. Georgia*, 398 U.S. 323, 331 (1970); *Morris v. Matthews*, 475 U.S. 237, 246-47 (1986); J.A. 115.

[66] *Matthews*, 475 U.S. at 248.